In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-842

TIIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. In its original decision in *Tiidee I* (Pet. App. 1-41),[1] the Board found that the Company, in resisting the organizational drive of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union), at its Dayton, Ohio, plant, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 158(a)(1) and (3), by interrogating employees about their union activities, by raising production quotas, and by discharging and laying off certain employees because of their support for the Union (Pet. App. 25-30). The Board also found that the Company violated Section 8(a)(5) and (1) of the

---

[1]Two Board decisions, hereafter *Tiidee I* and *Tiidee II*, were consolidated for purposes of review in the court of appeals.

Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union, which had been certified by the Board as the representative of its employees following a Board-conducted election, and by refusing to supply the Union with requested information necessary for it to bargain intelligently (Pet. App. 6-8; 30-31). The Board ordered the Company, *inter alia*, to cease and desist from the unfair labor practices found, to reinstate the discharged employees, and to bargain with the Union (Pet. App. 31, 33-36). The Board declined the Union's request for broader remedial relief (Pet. App. 31-32).[2] The court of appeals enforced the Board's order, but remanded the case to the Board for further consideration of the Union's request for additional relief (Pet. App. 118-119).

On the remand, the Board granted some of the additional relief requested by the Union, including the requirement that the Company reimburse the Board and the Union for litigation expenses, including attorneys' fees (Pet. App. 84-85).[3] The Board noted that, in *Heck's Inc.*, 191 NLRB 886, 889,[4] it had ruled that norm-

---

[2]The Union requested, *inter alia*, that the Company make the employees whole for wages and other benefits which they might have received but for the Company's unlawful refusal to bargain (the "make-whole" remedy), and pay the Union the amount of dues and initiation fees it lost as a result of that refusal.

[3]The Board denied the Union's request for a make-whole remedy (Pet. App. 81-82).

[4]On review, the court of appeals subsequently enlarged the Board's order in *Heck's*, holding that reimbursement of litigation expenses was appropriate in light of the Board's award of such expenses in *Tiidee I. Food Store Employees Union, Local 347* v. *National Labor Relations Board*, 476 F. 2d 546, 550-551 (C.A. D.C.). This Court reversed that decision, holding that the court of appeals had overstepped its reviewing function in thus enlarging the Board's order, rather than remanding the case to the Board for

ally litigation expenses are not recoverable in a Board proceeding. It concluded that a departure from this rule was warranted in the case of "frivolous litigation such as this is," since the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (Pet. App. 84-85).

In *Tiidee II* (Pet. App. 42-76), which involves further unfair labor practices committed by the Company after the events covered in *Tiidee I,* the Board followed the same course. It awarded litigation expenses, but declined the Union's request for a make-whole remedy (Pet. App. 95).

2. The court of appeals[5] upheld the Board's conclusion that the Union was not entitled to a make-whole remedy or to recover dues and fees and organizational expenses allegedly lost because of the Company's unlawful refusal to bargain (Pet. App. 147-150). The court also agreed with the Board that the non-monetary extraordinary remedies imposed upon the company "are necessary and appropriate to guarantee that rights conferred by Section 7 will not be denied" (Pet. App. 133-134). Finally, the court held

---

initial reconciliation of the "facial inconsistencies" between *Heck's* and *Tiidee I. National Labor Relations Board* v. *Food Store Employees,* 417 U.S. 1. On remand, the Board, reaffirming its earlier decision in *Heck's,* explained its reasons for "distinguishing between frivolous and debatable defenses in determining the efficacy of awarding litigation expenses and organizational costs as part of an appropriate remedial order." 215 NLRB No. 142, slip. op. 9, 88 LRRM 1049, 1052.

[5]Company and Union petitions for writs of certiorari before judgment, in order to permit consideration of the case at the same time as *Food Store Employees, supra,* were previously denied by this Court. *Tiidee Products, Inc.* v. *National Labor Relations Board,* 417 U.S. 921; *International Union of Electrical & Machine Workers, AFL-CIO* v. *National Labor Relations Board,* 417 U.S. 921.

that the Board "does have the power in appropriate cases to order [reimbursement of litigation expenses]" (Pet. App. 134-135). However, it modified the Board's award of attorney fees and litigation expenses by denying recovery of the Board's expenditures in litigating these cases (Pet. App. 145), and by limiting the Union's recovery to the "litigation before the Board in the initial *Tiidee I* and *II* decisions" (Pet. App. 147).

3. The petition presents the question which this Court did not "address" in *Food Store Employees, supra, i.e.*, "whether the Board's broad powers under § 10(c), 29 U.S.C. § 160(c), to fashion remedies include power to order reimbursement of litigation expenses and excess organizational costs." 417 U.S. at 8, n. 9. That question does not warrant review.[6]

a. There is no conflict in the circuits on the issue. Indeed, as the petition points out (Pet. 3), this is the first instance that the Board has imposed such a remedy. That this case is a "unique situation" (*ibid.*) is not surprising, for the Board imposes such a reimbursement remedy only in cases where frivolous defenses to unfair labor practice allegations have been raised, thereby needlessly clogging the Board's dockets and frustrating the Board's administration of the Act. *Heck's, supra,* 215 NLRB No. 142, slip op. at 10-11, 87 LRRM at 1052.[7]

---

[6]The petition also presents the question whether, assuming the Board's authority to impose such a reimbursement remedy, that remedy was properly used here. That issue likewise does not warrant review, since it is limited to the circumstances of this particular case.

[7]As this Court observed in *Food Store Employees:* "We cannot say that the Board, in performing its appointed function of balancing conflicting interests, could not reasonably decide that where 'debatable' defenses are asserted, the public and private interests in affording the employer a determination of his 'debatable' defenses, unfettered by the prospect of bearing his adversary's litigation costs, outweigh the public interest in uncrowded dockets." 417 U.S. at 8-9.

b. The decision below is correct. Section 10(c) of the Act "invest[s] the Board * * * with broad discretion to order a violator 'to take such affirmative action * * * as will effectuate the policies of [the Act].'" *National Labor Relations Board* v. *Food Store Employees, supra,* 417 U.S. at 8. "Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533, 539. Of course, the Act does not empower the Board "to devise punitive measures"; the "affirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth." *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U.S. 7, 11-12.

To award the union its litigation expenses attributable to the employer's insistence on frivolously litigating unfair labor practice charges is proximately related to vindicating the statutory rights of employees. Section 7 of the Act, 29 U.S.C. 157, gives employees the right to bargain collectively through representatives of their own choosing. An award of litigation expenses helps assure the employees that the union which they have chosen as their representative will have the same resources to represent their interests as it would have had absent the employer's unfair labor practices. Thus, "it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Virginia Electric Co.* v. *National Labor Relations Board, supra,* 319 U.S. at 543. Moreover, such an award would tend to deter future frivolous litigation and thereby

permit the Board and the courts more expeditiously to to carry out their statutory responsibilities in meritorious cases.[8]

For the foregoing reasons, it is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1975.

---

[8]In *Hall* v. *Cole*, 412 U.S. 1, 5, the Court stated that the rationale of the federal courts for taxing frivolous violators with attorneys' fees is "punitive." Contrary to petitioner's assertion (see Pet. 12-13), it does not follow that the same considerations motivate a Board award of such fees because, as shown in the text, a Board award of such fees is designed to vindicate the statutory rights of employees.